No. 10-732

IN THE

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Third Circuit acknowledged below that the "federal Courts of Appeals are split on whether [ERISA] Section 510 encompasses unsolicited internal complaints." Pet. App. 7a. Respondents do not dispute that this question is recurring and important and requires a nationally uniform answer. *See* Pet. 14-16; AARP Amicus Br. 4-6. Respondents insist, however, that this Court should not provide that answer in this case because the Third Circuit was wrong in discerning a circuit conflict, BIO 21-26, because this case presents a poor vehicle for resolving any conflict that may exist, BIO 28, and because the court of appeals correctly resolved the question for the three states in the Third Circuit, BIO 6-20. None of these objections has any merit or provides a reason to deny certiorari.

I. The Circuits Are Divided Over Whether ERISA Section 510 Applies To Unsolicited Internal Complaints, With Consequences In Two Important Legal Contexts.

Respondents insist that the Third Circuit was wrong in concluding (Pet. App. 7a, 14a) that its holding in this case conflicts with the Fifth Circuit's decision in *Anderson v. Electronic Data Systems Corp.*, 11 F.3d 1311 (5th Cir. 1994), and the Ninth Circuit's decision in *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (1993). Those cases, respondents insist, addressed only "whether Section 510 preempted a state whistleblower cause of action." BIO 22. And answering that question, respondents argue, did not require the courts to decide whether Section 510 provided a cause of action for unsolicited internal

complaints. BIO 23, 25. Respondents are simply wrong – both cases were required to, and did, decide the question presented by this petition.

1. First, there can be no question that both decisions construed ERISA to protect unsolicited internal complaints. After describing how Hashimoto was fired for raising an unsolicited complaint to company management, 999 F.2d at 409-10, the Ninth Circuit held that Section 510 "may be fairly construed to protect a person in Hashimoto's position if, in fact, she was fired because she was protesting a violation of law in connection with an ERISA plan," *id.* at 411. The court directly rejected any suggestion that Hashimoto was unprotected because she complained internally and unilaterally, explaining that the "normal first step in giving information . . . in any way that might tempt an employer to discharge one would be to present the problem first to the responsible managers of the ERISA plan." *Id.*

The Third Circuit was also right to observe that "the Fifth Circuit arrived at the same conclusion in *Anderson*." Pet. App. 8a. There, as in *Hashimoto*, the plaintiff was terminated after complaining of ERISA violations to company management. 11 F.3d at 1312-13. Although the complaints were unsolicited and made solely within the company, the Fifth Circuit "h[e]ld that Anderson's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations falls within the scope of the civil enforcement provisions of ERISA." *Id.* at 1315.

Respondents criticize both decisions as poorly reasoned, BIO 25, but they cannot dispute that those cases construed Section 510 in direct conflict with the

interpretations given the same provision by the Second, Third, and Fourth Circuits. *See* Pet. 8-14.

2. Respondents nonetheless argue that the Fifth and Ninth Circuits' construction of Section 510 was dicta because "[b]oth cases addressed only whether ERISA preempts analogous state law whistleblower complaints," not whether ERISA itself provides a remedy. BIO 2. Respondents are wrong again, their error stemming from a "failure to distinguish clearly between the concepts of 'ordinary' and 'complete' preemption," *McClelland v. Gronwaldt*, 155 F.3d 507, 515 (5th Cir. 1998). *See* Pet. 8 n.1.

Respondents' confusion of the two doctrines is particularly puzzling because the difference was explained with great clarity in one of the principal cases upon which they rely – the Fourth Circuit's decision in *King v. Marriott International, Inc.*, 337 F.3d 421 (4th Cir. 2003). In that case, the Fourth Circuit – like the Fifth Circuit in *Anderson* and the Ninth Circuit in *Hashimoto* – considered whether state law retaliation claims were properly removed to federal court.[1] The Fourth Circuit explained that "a defendant's raising of the defense of federal preemption is, under the well-pleaded complaint rule, insufficient to allow the removal of the case to federal court." *Id.* at 424. Nonetheless, "in some cases, federal law so completely sweeps away state law that any action purportedly brought under state law is transformed into a federal action that can be brought

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[1] *See Anderson*, 11 F.3d at 1312-13; *Hashimoto*, 999 F.2d at 409-10; *King*, 337 F.3d at 422-23.

originally in, or removed to, federal court." *Id.* at 425. "The operation of this rule has come to be known as the doctrine of 'complete preemption.'" *Id.*

The tests for ordinary and complete preemption are significantly different. While the "absence of a federal cause of action says nothing about whether a state law claim is preempted in the ordinary sense," a "vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted state cause of action." *King*, 337 F.3d at 425. "Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption, for in such cases there is no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong." *Id.* (emphasis added).

Accordingly, contrary to respondents' central premise, a court *must* decide "whether ERISA provides a cause of action for the wrongs alleged" by the plaintiff in order to determine whether a state retaliation claim is completely preempted by ERISA and therefore removable to federal court. *King*, 337 F.3d at 426; *see also, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (complete preemption arises when the plaintiff "could have brought his claim under ERISA").[2]

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[2] *See further Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) ("Congress has clearly manifested an intent to make causes of action *within the scope of the civil enforcement provisions of [ERISA]* removable to federal court.") (emphasis added); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation*

2. Respondents are only too happy to embrace the Fourth Circuit's complete preemption holding in *King* as establishing binding precedent on the scope of Section 510. BIO 9-11. But that court faced the same question decided by the Fifth and Ninth Circuits in *Anderson* and *Hashimoto*. In all three cases, the courts of appeals were required to decide whether removed state retaliation claims were completely preempted and therefore properly resolved in federal court.[3]

The Fifth and Ninth Circuits, like the Fourth, recognize that a claim is completely preempted only if ERISA provides a substitute cause of action. Thus, while the court in *Anderson* noted that ordinary preemption "does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong," BIO 25 (quoting *Anderson*, 11 F.3d at 1314), it also stressed that "finding that a claim is preempted does not end our analysis, since preemption is raised as a defense" and defenses do not provide a basis for removal. *Id.* at 1315. Instead, the Fifth Circuit recognized, "causes of action *within the scope of the civil enforcement provisions* of ERISA § 502(a) are subject to the complete preemption doctrine and removable to federal court." *Id.* (emphasis added). *See also, e.g.*, *McClelland*, 155 F.3d at 518 (finding no complete preemption where the plaintiff did not "assert a claim

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Trust for S. Cal., 463 U.S. 1, 26 (1983) (no complete preemption where "ERISA does not provide an alternative cause of action").

[3] *See Anderson*, 11 F.3d at 1313; *Hashimoto*, 999 F.2d at 412; *King*, 337 F.3d at 423.

that falls within any of the causes of action provided by" ERISA's enforcement provision).

The Ninth Circuit applied the same analysis in *Hashimoto*. There, the court of appeals agreed with the district court that the removed state law claims were preempted by ERISA. 999 F.2d at 411. But it went on to affirm that the district court had jurisdiction over the claims, relying on this Court's complete preemption decision in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58, 66-67 (1987). *See Hashimoto*, 999 F.2d at 412. Having found that "ERISA itself provides a remedy" for the plaintiff's claims, *id.* at 411, the court "remand[ed] for trial on this basis," *id.* at 409 – *i.e.*, on the basis of the plaintiff's properly recharacterized ERISA Section 510 claim. If the Ninth Circuit had decided only "whether Section 510 preempted a state whistleblower cause of action," as respondents assert (BIO 22), it would have been compelled to order the case remanded to state court.[4] Nor would it have ordered a trial on the merits if it had not concluded that the plaintiff stated a claim under Section 510.

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[4] *See, e.g., Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998) ("Only if the complaint asserts a state law claim that can be reasonably characterized as a claim under any of ERISA's civil enforcement provisions can the action be properly removed."); *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 934 (9th Cir. 1994) (explaining that "it would be contradictory to rule that state law claims are [completely] preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA") (citation omitted).

3. As the foregoing demonstrates, the proper scope of ERISA's anti-retaliation provision arises in two different, but important, contexts – challenges to the merits of a claim asserted directly under ERISA and objections to a defendant's attempt to remove parallel state law retaliation claims to federal court. Rather than provide a basis to deny certiorari in this case, the dual consequences of the present circuit conflict over the meaning of Section 510 amplify the need for this Court's intervention. At present, otherwise identical retaliation claims may or may not be removed to federal court, and may or may not succeed under ERISA, depending on the circuit in which the case is heard. The orderly adjudication, and the correct resolution, of such claims demands a nationally uniform interpretation Section 510. And given the entrenched, considered, and enduring disagreement among the lower courts, only this Court can provide that uniformity.

II. This Case Presents An Appropriate Vehicle For Resolving The Circuit Conflict.

Respondents' vehicle objections require little response. The circuits are divided over the legal consequences of two facts in Section 510 cases – the fact that the employee's complaint was unsolicited and the fact that it was made solely within the defendant company. Respondents allege no ambiguity in petitioner's allegations on those two points, nor could they. *See* Complaint ¶¶ 22, 29, 33,

38.[5] Instead, respondents complain that petitioner has not provided various other details that had no bearing on the court of appeals' decision below and have no relevance to the question presented for this Court's decision. *See* BIO 28.

Those objections – which could be reasserted on remand from this Court – are meritless in any event.[6] The complaint sets out in detail the substance of the alleged ERISA violations (Complaint ¶¶ 18-28), to whom petitioner complained ("Defendants' management and owners," *id.* ¶ 38, which includes management respondents Closterman and Cornell, *id.* ¶¶ 8-9), and when she made the complaints ("within the 2 weeks before she was terminated," *id.* ¶ 22; *see also id.* ¶¶ 18, 21, 30). Nothing in Section 510 or this Court's pleading decisions requires anything more.

III. Respondents' Defense Of The Third Circuit's Decision On The Merits Provides No Basis To Deny Review To Resolve The Circuit Conflict.

Finally, respondents' assertion that the decision below is correct provides no ground to leave the long-

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[5] The complaint is reproduced as an appendix to the brief in opposition.

[6] Respondents' objections to the specificity of the complaint would not provide an alternative ground for affirming the Third Circuit's dismissal of petitioner's complaint with prejudice. *See, e.g., Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) ("[I]n the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint.").

standing circuit conflict unresolved and is unconvincing in any event.

1. Respondents largely repeat without further elaboration the textual analysis adopted by the Third Circuit below. BIO 6-13. Petitioner has already addressed those arguments in her petition. Pet. 18-23. A few points, however, are worth emphasizing again.

Although respondents embrace the conclusion that an "inquiry" must entail a formal proceeding, BIO 10, they ignore that the word "proceeding" is already in the statute and implies a formality that "inquiry," in common usage, does not. *See* Pet. 18-20. Moreover, respondents' insistence that "the word 'inquiry' naturally encompass[es] only situations where one party makes a request for information from another party," BIO 8, is entirely consistent with petitioner's argument that Section 510 protects a worker who inquires of her employer whether a company practice might violate the law. *See* Pet. 20-21.

Respondents likewise simply ignore this Court's decision in *NLRB v. Scrivener*, 405 U.S. 117 (1972), which teaches that a statute protecting employees from retaliation for participation in a formal proceeding should be construed to encompass preliminary activities as well, including making statements that should prompt initiation of the proceeding (in *Scrivener*, a government hearing; in this case, an internal company inquiry).

To be sure, Congress could have used clearer language, as respondents observe. BIO 15 (pointing to Title VII's anti-retaliation provision). But

respondents then immediately undermine their own point by cataloging a number of other statutes that limit protection to workers participating in formal external proceedings, using language markedly narrower than that of Section 510. For example, respondents quote the anti-retaliation provision of the Clean Water Act, 42 U.S.C. § 7622, which applies only to "proceedings" and makes no mention of "inquiries." Likewise, respondents quote a provision of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610, which prohibits retaliation for giving "information" only if the information is "provided . . . to a State or to the Federal Government." Such provisions suggest that when "Congress intends to [exclude] unsolicited, internal complaints . . . Congress knows what language to use." BIO 20.

2. In reality, it is likely impossible to completely reconcile the various formulations Congress has used in different anti-retaliation provisions.[7] The focus ultimately must be on the best understanding of the language Congress used in any particular provision, in light of the statute's language and purposes, and basic common sense.

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[7] For that reason, this Court's impending decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834, addressing the scope of the Fair Labor Standard Act's anti-retaliation provision, 29 U.S.C. § 215(a)(3), will not affect the circuit conflict in this case. That provision – which protects an employee who "has filed [a] complaint" – is textually much more limited than ERISA's protection of workers who have "given information . . . in any inquiry," 29 U.S.C. § 1140.

As discussed above, the language of Section 510 does not compel the court of appeals' narrow reading. And as described in the petition, the court of appeals' construction is incompatible with the general purposes of the statute and draws a line between protected and unprotected conduct that makes little practical sense and would be difficult to administer in practice. Pet. 22-25.

To their credit, respondents do not deny the untoward consequences of the Third Circuit's interpretation. They do not contest, for example, that if an "inquiry" excludes unsolicited complaints, ERISA necessarily allows an employer to terminate a worker for filing a complaint with the Department of Labor. *See* Pet. 22. Nor do respondents deny that under their view of the statute, protection turns on whether the company fired the worker for making an initial complaint or, instead, for answering a follow-up question, a kind of distinction this Court rejected as "freakish" just last Term. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009).

Respondents nonetheless insist that Congress intended precisely that result in order to protect employers from "unscrupulous employees," BIO 15, and prevent individual workers from acting as "the enforcement arm of such a complex statutory regime," BIO 14. This hypothesized legislative intent is belied by the text of the statute itself. Respondents themselves acknowledge that the statute expressly *requires* employee-fiduciaries to monitor plan compliance with federal law and take action in response to suspected violations. BIO 15. Yet respondents' interpretation of Section 510 permits an

employer to terminate an employee-fiduciary for doing her statutory duty and bringing potential violations to the company's attention. Pet. 20-21. At the same time, despite the statute's complexity, ERISA provides *all* plan participants and beneficiaries with an enforcement role by authorizing a private right of action "to enjoin *any* act or practice which violates any provision of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(A) (emphasis added). Thus respondents' premise that Congress intended to leave ERISA enforcement to the experts is demonstrably false.

Nor have respondents adequately explained why Congress would have intended to protect workers from retaliation for filing a lawsuit – which gives rise to all the same concerns respondents raise regarding internal complaints, BIO 14-15 – yet permit an employer to fire the same worker for making the same complaint to management instead of to a court.

* * * * *

Petitioner need not "assume she is a better legislator than Congress," BIO 20, to recognize that in choosing among plausible constructions of a statute's text, courts are more likely to implement Congress's true intentions when they chose the interpretation that best advances the statute's objectives and avoids irrational distinctions no legislator would intend. The Third Circuit's decision in this case fails that test while exacerbating an entrenched circuit conflict over the meaning of an important provision of a federal statute affecting the wellbeing of millions of Americans. It should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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